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No. 08-1300

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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MAY IT PLEASE THE COURT:

Petitioners Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") hereby submit the following in response to Respondents' First Health Group Corp.'s ("First Health's") and Liberty Mutual Insurance Company's ("Liberty Mutual's) Oppositions to a Petition for Writ of Certiorari.

Gunderson's and LCMH's Petition for Writ of Certiorari involves (1) Liberty Mutual's improper use of the Declaratory Judgment Act (28 USC 2201) to remove pending state workers' compensation cases to a federal forum, and (2) First Health's improper reliance on the declaratory judgment (i.e. a partial final summary judgment) in favor of Liberty Mutual to enjoin actions beyond the scope of the workers' compensation fee dispute between Liberty Mutual and the Petitioners, as well as injunctions in favor of unidentified "payors" not involved in this litigation.

These issues involve important federal concerns including whether the Declaratory Judgment Act can be used as a tool to circumvent the Anti-Injunction Act, as well as constitutional due process concerns. The lower courts' rulings in this case are contrary to applicable concepts of due process recently made clear by this Court in *Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161 (2008), which was not available at the time of the trial court's ruling. Therefore, review from this Court is further necessary to be consistent with *Taylor*.

While Petitioners submit that they are challenging the injunctions granted in favor of only First Health and First Health's unidentified payors

(and not Liberty Mutual), the issues presented to this Court for review were sufficiently raised in the Courts below, and therefore were not waived.

A. PETITIONERS HAVE CONSISTENTLY CHALLENGED THE DISTRICT COURT'S AUTHORITY OVER LIBERTY MUTUAL'S ACTION.

The propriety of the injunctions granted in favor of First Health and First Health's unidentified payors turns in part on the district court's authority to render the underlying declaratory judgment (i.e. partial summary judgment) in favor of Liberty Mutual – whether the basis of that authority (or lack thereof) is termed as "jurisdiction" or "abstention". Despite the fact that Appellant-providers have challenged the court's authority over this action since the inception of this case, Respondents suggest that Petitioners have waived their right to now raise those same issues. However, even assuming Petitioners had not once raised the issue of abstention until now – which is clearly not the case – this Court has recognized that abstention issues may be recognized *sua sponte*. *Bellotti v. Baird*, 428 US 132, n.10 (1996), citing *England v. Medical Examiners*, 375 U.S. 411 (1964). See also *City of Houston v. Hill*, 482 U.S. 45, n. 16 (1987).

Contrary to Respondents' assertions, issues concerning the district court's authority over Liberty Mutual's action have been consistently challenged. Petitioners first raised issues of jurisdiction and abstention in their Motion to Dismiss shortly after the litigation began. Petitioners again raised abstention and

jurisdiction when they appealed the declaratory judgment (the partial summary judgment) rendered in favor of Liberty Mutual. The Fifth Circuit, however, dismissed the appeal without reason in a *per curiam* judgment.

Petitioners again raised jurisdictional questions when they appealed the injunctive relief granted in favor of First Health and its unidentified payors, which was supposedly necessary to "protect or effectuate" the judgment in favor of Liberty Mutual. In conducting the required *de novo* review, the Fifth Circuit incorporated its dismissal of Petitioners' appeal of the declaratory judgment, further making the abstention and jurisdiction issues reviewable by this Court. In its opinion affirming the injunctive relief, the Fifth Circuit found that "the appeal was dismissed for lack of jurisdiction because Gunderson improperly attempted to appeal the district court's denial of a 12(b)(6) motion to dismiss," and that "Gunderson failed to brief the only appealable issue, the district court's grant of summary judgment in favor of Liberty Mutual, and therefore abandoned that issue on appeal.[1]"

In other words, with respect to the summary judgment forming the basis of the injunctive relief, the Fifth Circuit bifurcated (1) issues concerning the court's authority to render the judgment, and (2) the merits of the judgment granted in favor of Liberty Mutual. Yet the Fifth Circuit went on to affirm injunctions over state court proceedings finding that

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[1] See FN 4 of the Fifth Circuit's Opinion (11/25/08), attached at page 15A of Petitioners' original Petition for Writ of Certiorari.

the underlying summary judgment was sufficiently "final" and had *res judicata* effect over the state actions that it enjoined. However, it seems illogical that a partial summary judgment could be "final" for *res judicata* purposes if the underlying issue concerning the court's authority (i.e. abstention and/or jurisdiction) to render that judgment was not likewise "final" or subject to appeal. As recognized by the U.S. First Circuit, "[i]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also all interlocutory orders that merge into that judgment.[2]" If in fact the issues of jurisdiction and/or abstention were never appealable – but instead only the merits of the partial summary judgment – the injunctive relief in favor of First Health and its unidentified payors should be overturned because there was no "final" judgment upon which to base the injunctions.

Issues concerning the district court's authority to render the underlying summary judgment were consistently raised below, and were considered by the Fifth Circuit in affirming the injunctive relief granted.

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[2] *In Re Olympic Mills Corp*, 33 B.R. 540 (B.A.P. 1st Cir 2005) citing *John's Insulation Inc. v. L. Addison and Associates*, 156 F.3d. 301 (1st Cir. 1998), citing *Tabron v. Grace*, 6 F.3d 147, 153 n. 2 (3d Cir.1993); *Williams v. General Motors Corp.*, 656 F.2d 120, 125-26 (5th Cir.1981); *Cattin v. General Motors Corp.*, 955 F.2d 416, 428 (6th Cir.1992); *Glass v. Dachel*, 2 F.3d 733, 738 (7th Cir.1993); *Employee Staffing Servs.* v.*Aubry*, 20 F.3d 1038, 1042 (9th Cir.1994); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir.1995); *see generally* 9 James W. Moore, et al., *Moore's Federal Practice* ¶ 203.17[3] at 3-92 & n. 19 (1996); 16A Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3949.4, at 67 & n. 13 (1996)."

Petitioners therefore have not waived the arguments they now present to this Court.

B. PETITIONERS HAVE NOT WAIVED THEIR DUE PROCESS ARGUMENT AND/OR ANY OTHER ARGUMENT CONCERNING THE PROPRIETY OF THE INJUNCTIVE RELIEF RENDERED IN FAVOR OF FIRST HEALTH AND/OR ITS UNIDENTIFIED "PAYORS."

In addition to jurisdiction and/or abstention issues, Petitioners' herein have also asked this Court to review (1) the district court's improper expansion of the concept the privity to allow non-parties to obtain injunctive relief, and (2) the district court's application of *res judicata* to actions beyond the scope of the judgment itself and/or the controversy involved therein. These issues necessarily involve questions of constitutional due process because Petitioners have been enjoined from pursuing state actions against parties and/or actions not involved herein. As recently recognized by this Court in *Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161 (2008) – which had not been rendered at the time that Petitioners filed their original appellant brief to the Fifth Circuit in March 2008 – the *res judicata* effect of a federal judgment is subject to due process limitations.

A cursory reading of the Fifth Circuit's opinion in this matter makes clear that Petitioners challenged the propriety of expanding the *res judicata* effect of the partial summary judgment in favor of only Liberty Mutual to First Health and/or its unidentified payors, as well as to claims or controversies beyond the scope of the judgment. The fact that Petitioners did not

specifically use the phrase "due process" in the courts below is irrelevant in that the *res judicata* effect of the judgment necessarily involves due process concerns. *Taylor*, supra.

C. CREATIVE DRAFTSMANSHIP SHOULD NOT BE A BASIS UPON WHICH TO ALLOW INTERFERENCE WITH PENDING STATE WORKERS' COMPENSATION ACTIONS.

While Respondents attempt to complicate the issues, the only controversy addressed by the declaratory judgment (i.e. partial summary judgment) in favor of Liberty Mutual is whether Liberty Mutual, as a workers' compensation insurer, properly paid Dr. Gunderson and LCMH for their workers' compensation related medical services as required by the Louisiana Workers' Compensation Act (La. R.S. 23:1021 et. seq). It is undisputed that this same fee payment dispute was pending between Liberty Mutual and Petitioners in hundreds of state workers' compensation actions long before Liberty Mutual sought declaratory relief from federal court.

The fee payment dispute did not involve First Health (who is not a workers' compensation payor) and/or any other First Health payor. Contrary to First Health's assertions, First Health did not file any claims against Petitioners, did not litigate any dispute with Petitioners, and in fact, First Health obtained no judgment against Petitioners warranting the injunctive relief granted. Further, the injunctions in favor of the unidentified payors should not be justified by the fact that Petitioners did not challenge, at the summary judgment phase, whether First Health provided them

with required payor listings because (1) the summary judgment did not involve any other payor, and (2) First Health filed no claims against Petitioners.

Respondents suggest that this Court should ignore fundamental policies embodied in the Anti-Injunction Act and the Declaratory Judgment Act, and condone the effective removal of hundreds of pending, otherwise non-removable, state workers' compensation actions, simply because Liberty Mutual cleverly tacked on a breach of contract claim and constitutional challenge to its declaratory action. However, this Court long ago refused to allow a defendant in a pending state action to pursue a declaratory action in federal court or otherwise seek to enjoin the pending state action. *Samuels v. Mackell*, 401 US 66 (1971). In so doing, this Court observed:

> "[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory

> judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."

The creative breach of contract claim and constitutional challenge, which are still pending nearly five years later, should not serve to override the principles enunciated in *Samuels*.

Liberty Mutual's breach of contract claim does nothing more than assert an unsupported theory that Petitioners breached their contract with First Health because they filed fee payment disputes against Liberty Mutual in state workers' compensation court long before the instant action. The impropriety of relying on this claim to take precedence over mandatory abstention concerns is highlighted by the fact that (1) the claim is not ripe for adjudication because there has been no ruling in any of the workers' compensation actions and (2) the only damages available would result from a workers' compensation judgment rendered against Liberty Mutual. Further, allowing such procedural gamesmanship in this case would allow any workers' compensation insurer to remove its defenses to pending state workers' compensation actions by filing a "declaratory action" and tacking on either an allegation that the employee breached its employment contract by simply suing the insurer, or an allegation that its potential damages are unconstitutional.

Likewise, Liberty Mutual's constitutional challenges of the Louisiana PPO Act (La. R.S. 40:2201 et. seq) should not undermine mandatory abstention.

These constitutional concerns arise solely from Liberty Mutual's affirmative defense to the workers' compensation fee payment dispute. It is well established that an anticipated affirmative defense to a declaratory-defendant's (i.e. the traditional Plaintiff's) action against the declaratory-plaintiff does not affect the federal court's jurisdiction over the declaratory action[3], and likewise, an affirmative defense should not justify an interference with pending state proceedings. Further, Louisiana law provides a procedure for workers' compensation defendants such as Liberty Mutual to raise constitutional defenses[4]. Contrary to First Health's assertions, the constitutional questions did not transform this case into one of "federal question" jurisdiction, and in fact, the district court exercised jurisdiction solely on the basis of diversity under 28 USC 1332.

Respondents have provided no authority to support their theory that the additional claims tacked on to Liberty Mutual's declaratory action somehow gave the district court authority to the otherwise improper declaratory judgment. This Court's *Horton*[5] decision simply stands for the proposition that, with respect to Texas workers' compensation cases, once the Texas administrative board issues an opinion, either party may file an original action (as permitted by Texas law) in federal court, as opposed to state court, if diversity jurisdiction is satisfied. What Respondents deemphasize to this Court, however, is that Liberty

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[3] *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667 (1950); *Public Service Commission v. Wycoff Co.*, 344 US 237 (1973).

[4] La. R.S. 23:1310.3(F)

[5] *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961)

Mutual's declaratory action was not an original action, but instead, an effective removal of pending workers' compensation actions. Further, the *Trejo*[6] case relied upon by Respondent First Health likewise involved an original action involving the interpretation of a workers' compensation related settlement agreement. First Health further fails to recognize that the *Trejo* court actually remanded the case for consideration of whether abstention pursuant to the Declaratory Judgment Act was required.

Because the district court lacked authority to render the underlying summary judgment in favor of Liberty Mutual, the injunctive relief granted in favor of First Health and its unidentified payors, which was based upon that judgment, is improper. Further the injunctive relief is beyond the scope of the judgment in favor of Liberty Mutual, and benefits entities not parties thereto. Therefore, the injunctive relief is further improper.

RESPECTFULLY SUBMITTED:

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[6] *St. Paul Ins. v. Trejo*,39 F.3d 585 (5th Cir. 1994)